STATE OF MICHIGAN

COURT OF APPEALS

In re STAMBAUGH/PANTOJA, Minors.

UNPUBLISHED
February 11, 2021

Nos. 354320; 354370
St. Joseph Circuit Court
Family Division
LC No. 2019-000228-NA

Before: BECKERING, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondents appeal the order terminating their parental rights to their three minor children pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (risk of harm). We conditionally reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The Department of Health and Human Services (DHHS) filed a removal petition in March 2019 after respondent mother informed Children's Protective Services that she did not have housing, transportation, or means to care for the children. Respondent father's whereabouts were unknown and there was a warrant outstanding for his arrest because he had violated probation in a case in which he pleaded guilty to the possession of methamphetamine. The court approved the petition and the children were placed in foster care.

Both respondents pleaded to the court's jurisdiction and were ordered to participate in and benefit from a case service plan. Respondent mother failed to substantially comply with the case service plan and continued to use methamphetamine. Her parenting time visits were suspended in May 2019. Respondent father was released from jail in June 2019 but failed to participate in services and also continued to use methamphetamine. As of the February 2020 permanency planning hearing, respondents were in jail on charges related to the possession of

[1] *In re Stambaugh/Pantoja, Minors*, unpublished order of the Court of Appeals, entered August 11, 2020 (Docket Nos. 354320 and 354370).

methamphetamine. At the time of termination hearing in July 2020, neither respondent had been in contact with the children in over a year, respondent father was in jail, and respondent mother was living in Indiana so that she could satisfy the terms of her probation for a case there.

After the hearing, the trial court found by clear and convincing evidence that respondents failed to provide proper care and custody for the children and would be unable to do so in a reasonable time. The court also found that returning the children to either respondent posed a risk of physical or emotional harm to the children. The trial court also concluded that the termination was in the best interests of the children because respondents were unable to provide the three young children with permanency and stability.

II. RESPONDENT MOTHER

A. PLEA

On appeal, respondent mother presents only procedural challenges. She first argues that the trial court erred by accepting her plea of admission to the allegations in the petition because two of her responses to the referee's advice of rights were inaudible and, as such, the plea was not made voluntarily and understandingly. We disagree.[2]

At the adjudication-phase of child protective proceedings, the trial court considers whether it "can exercise jurisdiction over the child (and the respondent-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). If the court assumes jurisdiction on the basis of the respondent parent's plea to allegations in the petition, due process requires that the court ensure that the respondent's plea of admission or no contest be "knowingly, understandingly, and voluntarily made before the court can accept it." *Id*. at 21, citing MCR 3.971(D)(1). The trial court must advise respondent " 'on the record or in a writing that is made a part of the file,' of the allegations in the petition, the right to an attorney, the rights the respondent will be waiving by entering a plea, the consequences of that plea including the possibility that the plea will 'be used

[2] Respondent mother neither moved to withdraw her plea nor objected to the advice of rights that she was given in the trial court. Therefore, this claim is unpreserved. *In re Pederson*, 331 Mich App 445, __; __ NW2d __ (2020) (Docket No. 349881); slip op at 8. "[A]djudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Under the plain-error standard, a respondent "must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected their substantial rights.' " *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

as evidence in a proceeding to terminate parental rights,' MCR 3.971(B)(4) . . . ." *In re Ferranti*, 504 Mich at 21.[3]

The record demonstrates that before admitting to certain allegations in the petition respondent mother was advised of the allegations in the petition, her right to a trial, the rights that she waived by entering a plea, the consequences of entering a plea, and that her plea could be used as evidence in a future termination proceeding. Respondent mother's counsel did not object to any of respondent mother's responses or to the referee proceeding with the plea process. Rather, respondent mother's counsel proceeded to question respondent mother about the allegations in the petition, and respondent mother admitted to the allegations in the petition. After a factual basis for the plea of admission was set forth, the referee accepted respondent mother's plea as establishing the court's jurisdiction over the children. Thereafter, the trial court entered an order of adjudication and a record of plea that indicated that respondent mother's "plea was made knowingly, voluntarily, understandingly, and accurately made as provided by the court rules and was accepted by the court."

Respondent mother nonetheless argues that we should now conclude that her plea was invalid because the transcript recorded two of her responses to the referee's advice of rights as "inaudible."[4] However, the record does not demonstrate that respondent stated or indicated anything other than an affirmative response. For example, the record does not reflect that the referee needed to restate or clarify any of the rights for respondent mother because she did not understand or answered in the negative. And no party objected to the referee continuing with the plea process after any respondent mother's responses. Thus, the record does not reflect that respondent mother's responses were inaudible to anyone other than the transcriber. Moreover, the issue was never raised during the 15-month proceeding that followed. Therefore, on the basis of the record before us, the trial court did not err by accepting respondent mother's plea.

B. ICWA & MIFPA

Respondent mother also argues that the order terminating her parental rights should be conditionally reversed because the trial court failed to follow the procedures set forth in the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712A.1 *et seq.* We agree.[5]

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[3] The requirements cited in *Ferranti* were current when respondent's plea was made on March 28, 2019. MCR 3.971 was subsequently amended to include additional rights that the trial court must advise the respondent of.

[4] Specifically, the referee asked respondent mother whether she would be voluntarily entering a plea of admission, and respondent mother's response was "inaudible." Later, the referee asked respondent mother if, with all of the advice that she had been told, whether she still wished to enter a plea of admission, and respondent mother's response was "inaudible."

[5] "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). "[A] parent cannot

Both ICWA and MIFPA establish similar substantive and procedural protections that govern child custody proceedings involving Indian children. An "Indian child" is defined by ICWA as an "unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe." *In re Morris*, 491 Mich 81, 100; 815 NW2d 62 (2012), quoting 25 USC 1903(4) (quotation marks and emphasis omitted). See also MCL 712B.3(k). However, only an Indian tribe can determine its membership. *In re Morris*, 491 Mich at 100. Thus, "when there are sufficient indications that a child may be an Indian child," any tribe that the child may potentially belong to must be notified of the child custody proceedings so the tribe can advise the court of the child's membership status. *Id*. ICWA's notice provision provides:[6]

> In any involuntary proceeding in State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 USC 1912(a).]

There is no question that there was "reason to know" in this case that an Indian child may be involved. At a hearing held on September 12, 2019, the foster-care worker, Julie Grant, testified that she had been informed by respondent mother and respondent mother's uncle that they may have Indian heritage. Grant explained that "[w]e do think it's a strong possibility that there is Native American heritage based on the great-grandmother [that] was removed from tribal land, was adopted by a white family, which in our experience is indicative of Native American heritage." Grant testified that she notified three tribes to determine the children's eligibility for membership, but at the time of the hearing, Grant had not heard back from the tribes. The trial court made no further inquiry into the children's potential Indian heritage and the issue was never raised again. In addition, the lower court record is void of any record demonstrating compliance with the notice requirements of ICWA and MIFPA.

This case is thus similar to *In re Gordon* (the companion case to *In re Morris*), in which the caseworker testified that she sent notice to the relevant tribe and the respondent's mother said

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waive a child's status as an Indian child or any right of the tribe that is guaranteed by ICWA." *Id*. at 111.

[6] The notice requirements under ICWA and MIFPA are similar. See *In re Jones*, 316 Mich App 110, 113; 894 NW2d 54 (2016); MCL 712B.5.

that the tribe informed her that the family was "not eligible for tribal benefits," *In re Morris*, 491 Mich at 94, but there was no documentation in the record verifying those claims:

> The record includes no copies of the actual notices purportedly sent to either the Saginaw Chippewa Indian Tribe or the Secretary of the Interior. There are no postal return receipts indicating whether notice was received and, if so, by whom. Lastly, the record includes no documentation of any tribal response or other subsequent communications documenting the court's and the DHS's efforts to ensure compliance with ICWA. [*Id*. at 96.]

Accordingly, it was "impossible to discern from the record in *Gordon* whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients." *Id*. at 112. The Supreme Court held that a trial court must comply with the following record-keeping requirements relating to ICWA:

> [W]e hold that trial courts have a duty to ensure that the record includes, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, it would be helpful—especially for appellate purposes—for the record to include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a). [*Id*. at 114.]

As in *Gordon*, it appears that the caseworker attempted to comply with the statutory notice requirements. Grant testified that she had sent notice to three specific tribes after receiving information indicating that the children had Indian heritage. However, the record is void of any information regarding when the notices were sent, whether the noticed tribes responded within the allotted time, and, if the noticed tribes responded, whether the children were members of a tribe or eligible for membership in a tribe. Thus, while it is possible that DHHS sent proper notice and that the contacted tribes either determined that the children were not eligible for tribal membership or declined to intervene in the proceedings, we cannot conclude that the statutory notice requirements were satisfied in this case.

The appropriate remedy for notice violations is to conditionally reverse the trial court's order terminating a respondent's parental rights and remand to the trial court for resolution of the notice issues. *Id*. at 122-123. See also *In re Johnson*, 305 Mich App 328, 332-334; 852 NW2d 224 (2014). We also conclude that the termination of respondent father's parental rights must be conditionally reversed given that at least some of ICWA and MIFPA's provisions would apply to the proceedings against him.[7] If the trial court determines on remand that ICWA and MIFPA do

[7] See *In re SD*, 236 Mich App 240, 243-247; 599 NW2d 772 (1999) (holding that "active efforts," were not required to terminate the parental rights of the non-Indian father when termination did not result in disruption of an "Indian family," 25 USC 1912(d), but still requiring evidence beyond a reasonable doubt that continued custody would result in serious emotional or physical damage to the child, 25 USC 1912(f)). See also *In re Beers*, 325 Mich App 653; 926 NW2d 832 (2018).

not apply, the order terminating respondents' parental rights should be reinstated. See *In re Morris*, 491 Mich at 123. However, if the trial court determines that ICWA and MIFPA do apply, then the order terminating respondent' parental rights should be vacated, and "all the proceedings must begin a new in accord with the procedural and substantive requirements of ICWA" and MIFPA. *Id*.

III. RESPONDENT FATHER

A. STATUTORY GROUNDS

As noted, the order terminating respondent father's parental rights is conditionally reversed. However, in the event that ICWA and MIFPA are found not to apply, we will address the arguments presented by his appeal. Respondent father first argues that the trial court erred by finding that statutory grounds existed to terminate his parental rights.[8]

"To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). The trial court terminated respondent's parental rights under MCL 712A.19b(3)(g), concluding that, despite being financially able to provide for his children,[9] respondent father failed to provide proper care and custody for his children and there was no reasonable expectation that he would be able to do so within a reasonable amount of time considering the children's ages. The primary barrier to respondent providing proper care for his children was his methamphetamine addiction and his failure to make any progress toward rectifying it. At the termination hearing, respondent was candid regarding his addiction. He explained that he had been using methamphetamine for about 15 years and he acknowledged that the drug was highly addictive. Respondent father continued to use methamphetamine throughout this case, admitted his use, went to jail multiple times on charges related to his use, was arrested the week before the termination hearing because of his use, and was in jail awaiting sentencing on a possession of methamphetamine charge at the time of the termination hearing. When he was not incarcerated, he failed to participate in the case service plan that was aimed toward addressing his substance abuse issues. See *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014) ("A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody."). Specifically, respondent father failed to submit drug screens as requested by DHHS, and the two drug screens that he did submit to were positive for methamphetamine. Respondent father testified at the termination hearing that he had begun substance abuse counseling sometime in 2020, but the caseworker, Kenya Davis, testified that she did not receive any documentation or confirmation

[8] This Court reviews the trial court's factual findings regarding statutory grounds for termination of parental rights and the decision to terminate parental rights for clear error. MCR 3.977(K); *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). A finding is clearly erroneous if this Court is "left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citations omitted).

[9] Respondent father testified that he would be able to financially provide for his children because he was seasonally employed and was receiving unemployment benefits.

that respondent father participated in any of the services that he was referred to, including substance abuse counseling.

Further, respondent father failed to participate in a psychological evaluation that was necessary for DHHS to refer him to more individualized services. Respondent father argues that his failure to participate in a psychological evaluation was the result of DHHS's failure to schedule him for, or transport him to, a psychological evaluation. However, Davis testified that respondent father was referred for a psychological evaluation in December 2019, but he failed to attend. Davis also testified that respondent father failed to maintain communication with her and never informed her that he needed transportation to the scheduled psychological evaluation.

In addition, respondent father failed to obtain safe, suitable, and independent housing or transportation. He had not seen the children in over a year, and he admitted that he would not be able to care for the children if they were returned to his care. Given his longstanding methamphetamine addiction and his failure to make any progress on that matter, it was not clear error for the court to find that respondent father would be unable to provide proper care in a reasonable time. Accordingly, the trial court did not clearly err by terminating respondent father's parental rights under MCL 712A.19b(3)(g).

Respondent father also argues that the trial court erred by terminating his parental rights under MCL 712A.19b(3)(j). However, because a petitioner need only establish one statutory ground by clear and convincing evidence to terminate a respondent's parental rights, *In re Ellis*, 294 Mich App at 32, we decline to address whether termination under this statutory ground was proper.

B. BEST-INTERESTS ANALYSIS

Respondent father next argues that the trial court erred when it found, by a preponderance of the evidence, that the termination of his parental rights was in the best interests of the children.[10]

The petitioner bears the burden to establish by a preponderance of the evidence that termination is in the best interests of the child. *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

The trial court's best-interests analysis focused on the children's need for stability and permanency and concluded that respondent father would be unable to provide the permanency and

[10] We review a trial court's decision regarding a child's best interests and the decision to terminate parental rights for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000), superseded by statute on other grounds as recognized in *In re Moss*, 301 Mich App 76, 83 (2013). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

stability that the young children needed. We see no clear error in that determination. Throughout the proceedings, respondent father was unable to provide stability and permanency for himself, let alone for his children. Respondent father continued to use methamphetamine and at the time of termination—held 15 months after the children's removal—he was in jail on a methamphetamine related charge, and had only just recognized the severity of his addiction and the impact that it had on his children. Respondent father testified that he needed to make some "big time changes" in his life and wished that he had realized that earlier than the termination hearing. Respondent father never had visitation with the children and had not been in contact with the children in over a year. And these young children were thriving in their preadoptive foster home.

Respondent father argues that the best-interests analysis was biased against him because the trial court did not allow him to have visitation with the children. We agree that the trial court provided no grounds for not allowing visitation between the time of removal and the petition for termination.[11] However, there was no objection to the court's visitation order and respondent father has not claimed on appeal that the court's denial of visitation is grounds, in and of itself, to reverse. In addition, respondent father was in jail for significant periods following removal, did not comply with the treatment plan or court orders, pleaded guilty to possession of methamphetamine shortly before the termination hearing and agreed that he was not prepared to care for the children upon his release from jail. Thus, we conclude that the trial court's best-interests determination was not in error.

IV. CONCLUSION

The order terminating respondents' parental rights is conditionally reversed and the case is remanded for the trial court to determine whether ICWA and MIFPA apply. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[11] The trial court ordered no parenting time between removal and the filing of termination petition until respondent father provided three consecutive clean drug screens. It cited no authority for denying parenting time on this basis, nor did it articulate why "exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile[] . . . ." MCL 712A.13a(13); MCL712A.18(1)(n).